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No. 99-1572

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1999

WILLIAM H. VIEHWEG
Petitioner

vs.

SUSAN H. MELLO
Respondent

On Petition for Writ of Certiorari
to United States Court of Appeals
for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

•1. Mello misstates that Viehweg's appeal to the Eighth Circuit did not include the issue of the order denying his motion to disqualify Mello as co-counsel (page 1,¶1; page 3, ¶2; page 5, ¶4). Viehweg's Appeal Information Form A, required by the Eighth Circuit to be filed with the notice of appeal, under the heading "List Issues On Appeal", stated the following: "The trial court ruled in prejudicial error in its order of December 2, 1997, denying appellant's motion to disqualify appellee Mello".

•2. Mello misstates that Viehweg did not raise the issues of constitutional violations and Federal Rule of Appellate Procedure 34(a)(2) violations in his question presented for review in his petition, or in the lower courts (page 9, ¶2). First, said issues are fairly included in his question presented for review. Viehweg is a non-attorney, and as federal statute 28 §1654 prohibits him from having legal (and competent) co-counsel, the term "fairly" should be liberally applied. Second, Viehweg did raise the issues earlier. Viehweg's Petition For Panel Rehearing By Appellant, filed with the Eighth Circuit on November 1, 1999, page 7 and 8, states the following:

> "When this court erroneously allowed Appellee Mello to enter her appearance as legal counsel for herself in violation of Missouri law, erroneously allowed Appellee Mello to simultaneously represent herself pro se while she was represented by counsel in violation of federal statue 28 §1654, and erroneously denied Appellant Viehweg his right to represent himself by denying his right to oral argument based solely upon his standing as a non-attorney pro se in violation of FRAP 34 and federal statute 28 §1654, this court acted with partiality in favor of Appellee Mello and in disfavor of Appellant Viehweg, in violation of its duty to treat the

parties before it impartially and Appellant Viehweg's United States Constitutional right to equal application of the law. Therefore any proceedings subsequent to Appellee Mello's filing of her notice of appearance as legal counsel for herself, are patently unjust."

• 3. Mello misstates that while Ms. Mello was co-counsel with the law firm of Moser and Marsalek, most of the filings were done in joint names (page 1, ¶2). Just the opposite is true. In the eight month period from Ms. Mello's notice of entry of appearance as co-counsel (April 4, 1997) and Moser and Marsalek's withdrawal as her (first) legal counsel (December 5, 1997), twenty-five documents were filed on Mello's behalf. Seven were submitted on Moser and Marsalek's signature only (Doc's 19, 45, 48, 49, 51, 52, 60). Fourteen were submitted on Ms. Mello's signature only (Doc's 16, 25, 28, 31, 32, 33, 34, 35, 37, 38, 43, 68, 75, 77). One submitted motion was signed by Moser and Marsalek, with the accompanying memorandum of law signed by Ms. Mello (Doc 40). Only three, or twelve percent of the total, were submitted on both Moser and Marsalek's and Ms. Mello's signatures (Doc's 17, 26, 71). Further, Ms. Mello served upon Viehweg an additional ten pleadings and tried, unsuccessfully, to file them with the court (Petition page 8, uncontested).

• 4. Mello misstates that Ms. Mello made no submissions to the Eighth Circuit court under her name only after Noce & Buckley entered their appearance her behalf (page 3, ¶4). Ms. Mello made six such submissions. Noce and Buckley entered their appearance on December 18, 1998. On the same day, Ms. Mello filled a response to Viehweg's motion for sanctions under her signature only. On January 5, 1999, Ms. Mello filed a response to Viehweg's motion to vacate, and a response to Viehweg's motion to quash, both under her signature only. On

April 8, 1999, Ms. Mello filed a response to Viehweg's motion for 28(j) citation under her signature only. Also on April 8, 1999, Ms. Mello filed a response to Viehweg's motion for protective order, under her signature only. (See copy of response in Viehweg's Petition for writ of Certiorari, Appendix pages 20, 21) On April 23, 1999, Mello filed a response to Viehweg's motion for sanctions for intentional violations of statute 28 Sec. 1654, under her signature only.

• 5. Mello misstates that though Ms. Mello and her attorney filed duplicitous motions to compel, only one such motion was taken up (page 1,¶2). Both motions were taken up and ruled on by the district court, with the court acknowledging their duplicity. The December 2, 1997 memorandum and order addressing those motions states the following:

> "Defendant alleges in her motion to compel answers to her amended first set of interrogatories that she mailed the interrogatories to Plaintiff on June 4, 1997, and has not yet received any answers. Plaintiff is ordered to file answers to the amended first set of interrogatories within ten days of the date of this Order. Defendant also alleges in a second motion that Plaintiff has failed to answer a May 1997 set of interrogatories and a request for production of documents. Plaintiff counters that Defendant and counsel are harassing him by sending duplicate sets of interrogatories. Defendant's motion will be granted insofar as it seeks a response to a request for production of documents. In light of the foregoing order directing Plaintiff to respond to the June interrogatories, Defendant's motion to compel answers to May interrogatories will be denied without prejudice as it appears that the amended June interrogatories superseded the May interrogatories."

• 6. Mello misstates that Viehweg's injunctive action in the St. Louis County Circuit Court concerning Mello's entry as her own legal counsel in the federal court case was denied (page 4, ¶1). The case was dismissed for lack of subject matter jurisdiction, as stated by the Missouri Court of Appeals opinion dated December 7, 1999:

> "Missouri courts lack subject matter jurisdiction to enjoin a federal court as to who may appear and be recognized within that court and its interpretation of its rules and procedures....The prohibition against state courts interfering in federal court proceedings is not altered by the fact that the injunction sought by Appellant was addressed to Respondent rather than the federal court itself.....The circuit court lacked jurisdiction to issue an injunction and, therefore, did not err in dismissing Appellant's petition. Since this court's jurisdiction is no greater than the circuit court's, the appeal must be dismissed."

• 7. Mello misstates that the district court entered a protective order for Ms. Mello prohibiting Viehweg from contacting her directly, allowing her police protection, and allowing her a commissioner at her deposition (page 2, ¶s 1,2). No such order was entered. First, Mello's motion for a protective order was denied on December 2, 1997 when the district court entered its memorandum and order stating the following:

> "Defendant moves in a motion to quash and for a protective order and also in a motion to quash notice of deposition for an order quashing Plaintiff's notice of deposition and protecting her from such a deposition. The Court outlined during the motion hearing the conditions precedent to and the restrictions on Defendant's and Plaintiff's depositions. Defendant's motions will, accordingly, be denied."

Second, the following transcript of the November 17, 1997 discovery hearing reveals that due to the improbability of any productive communication between Ms. Mello and Viehweg, the court did restrict Mello and Viehweg, mutually, from contacting each other, directing all such contact to go through Mello's attorney. Also, that due to concerns expressed by both Viehweg and Mello, the court did, per mutual agreement of the parties, direct that a commissioner attend Mello's deposition. And, that there was no discussion of "police protection", though there was discussion of a body guard for Mello, with the court leaving that to Mello's discretion.

Page 28, line 5 to page 28, line 11.

MR. MUELLER: Any communication in the case can be through me or through my partner, Mr. Plegge.
THE COURT: Okay. Mr. Viehweg, without accusing you of anything, I would agree that that's an appropriate order. In fact, I'm gonna make it cut both ways, just so that, -- I don't want Ms. Mello contacting you, and I don't want you contacting Ms. Mello.

Page 25, line 17 to page 26, line 15.

MR. VIEHWEG: Your Honor, I can understand the commissioner, and I'll agree to that, but I don't understand why I would have to pay the cost of the security guard. If they wish to have one, if they feel the need of one, I think that that's their option. But I think a commissioner ought to be sufficient.
THE COURT: And you'll pay for half of the commissioner?
MR VIEHWEG: I'm willing to go half if that will resolve the issue, yes.
THE COURT: That will certainly resolve your concern.

MR VIEHWEG: Yes, it does.
THE COURT: Okay. That's a good idea. The Court will order the parties to, -- and I'll ask Mr. Mueller, -- Mr. Mueller has a reputation before this Court and others, he's been in practice for many years, and I would expect that Mr. Mueller and you can sit down and choose a commissioner to show up, perhaps a retired judge or something like that, to sit and handle this.
MR MUELLER: That's fine, your Honor.
THE COURT: Mr. Mueller, if you and your client believe there's a security risk then you'll bear the cost of any sort of a security guard.

• 8. Mello misstates the Missouri Court of Appeals ruling concerning Ms. Mello's co-signing of pleadings in its court (page 4, ¶1 and page 8, ¶3). On August 30, 1999 the state appeal court denied Viehweg's motion to strike a pleading co-signed by Ms. Mello. The court order included the following opinion: "Susan Mello signing her name to a pleading along with her attorney does not violate eastern district rule 380". No other memorandum was issued on the matter. Ms. Mello had never filed a formal entry of appearance, had never filed a pleading under her name only, and did not personally attend oral arguments. The case record lists only Gerard T. Noce as legal counsel. The court simply stated that a party can co-sign a pleading with her attorney.

• 9. Mello misapplies the *Erie* doctrine (page 8, ¶2). Ms. Mello's admission to the federal bar was conditioned upon Ms. Mello having a license from the state of Missouri to practice law. Any subsequent entry of appearance in the federal courts by Ms. Mello as legal counsel for a party, is conditioned upon her Missouri law license remaining in good standing.

Should the Missouri Supreme Court suspend or disbar Ms. Mello, prohibiting her from practicing law, the state court action would be controlling in federal court also, prohibiting Ms. Mello, from entering, or maintaining, her legal appearance on behalf of a party. Though Missouri state courts can not control procedure in federal courts, nor control Ms. Mello as a party, the state court can control any attempt by Ms. Mello to use her Missouri law license, even in federal court.

Further, Ms. Mello's Missouri law license only authorizes her to practice law. As the Missouri Supreme Court does not consider the self-representation of natural persons in court to be the practice of law, Ms. Mello's Missouri law license does not authorize her to enter her appearance as legal counsel for herself. None of these conditions and prohibitions are contrary to the *Erie* doctrine.

• 10. Mello misrepresents her status before this court and violates Supreme Court Rule 34(1)(g) by including her name and address on her brief cover. Ms. Mello's sole status before this court is that of a party. Federal statute 28 §1654 prohibits Ms. Mello from simultaneously appearing pro se while she is represented by her counsel of record, Gerard T. Noce. SCR 34(1)(g) prohibits the names of parties from appearing on the cover unless they are appearing pro se. In this case, Ms. Mello is neither "acting as counsel", nor appearing "pro se". Though Ms. Mello refers to her status as "Respondent Pro Per", the term "pro per" is neither authorized or defined by any statute or case law, nor is it defined by any legal dictionary or encyclopedia. As such, the term "pro per" is mere attorney slang with indefinite meaning.

• 11. Mello misapplies Missouri public policy regarding liability insurance (page 8, ¶1). Nothing in the policy prevents an insurance company from covering legal fees incurred

defending an attorney from a claim for constructive fraud arising out of the attorney's representation of a client. The public policy does prevent the insurance company from covering any award of punitive damages.

In this case, Mello's insurance counsel has filed pleadings defending Ms. Mello from all claims against her, including ones in which a punitive damage award would not be covered. Simultaneously, Ms. Mello has also filed pleadings defending herself from all claims against her, including ones in which a damage award would be covered.

Though Mello argues that she has two distinct interests, and thereby requires two distinct defenses, she has not even attempted to limit her insurance counsel's representation to one interest, and her own self-representation to the other. Furthermore, Ms. Mello now appears to claim that her "right" to personally defend her "uninsurable interests" is, in itself, an "insurable interest", as her insurance counsel is jointly defending her claim.

• 12. Mello misapplied prejudice and abuse of discretion to Ms. Mello's entry of appearance as co-counsel. While trial judges have some discretion over joint representation of a party, case law limits that discretion to a handful of occasions, such as granting a party represented by counsel permission to speak at a motion hearing, allowing a defendant to approach the court concerning conflicts with court appointed counsel, and, on the rare occasion, permitting the filing of a single pro se pleading by a criminal defendant and "gratuitously" considering it.

Viehweg's petition states substantial prejudice and gross abuse of discretion as evidenced by the following:

a) Throughout the trial and appellate court proceedings, Ms. Mello misrepresented her true status before the court by demanding to be recognized in an unauthorized capacity - that of legal counsel for herself.

b) Ms. Mello personally initiated discovery by serving upon a non-party, a subpoena that had been "authorized" by Ms. Mello's signature only, and demanded the production of confidential records. The trial court denied Viehweg's motion to quash the subpoena, the records were ordered produced, and Mello used them in support of her motion for summary judgment. If Viehweg had done the same (signing a subpoena), he would have been guilty of a felony - impersonating a court officer.

c) Ms. Mello personally initiated discovery by serving upon Viehweg a Rule 36 request for admissions, under her signature only. Ms. Mello subsequently filed a motion, under her signature only, to determine the sufficiency of Viehweg's responses (Doc 31). The trial court ruled on Ms. Mello's motion and ordered Viehweg to supplement some of his answers. The admissions were used by Mello in her motion for summary judgment.

d) During discovery, Ms. Mello filed fourteen pleadings with the trial court on her signature alone. Though she served ten others upon Viehweg, she was unsuccessful in filing them with the court.

e) Mello admits that she and her legal counsel had filed duplicitous motions to compel discovery. As the record indicates, both motions were heard and ruled upon by the trial court.

f) The trial court found that Mello's dual representation was "ridiculous, and it's double-teaming Mr. Viehweg, and it's just not fair".

g) The trial court granted Mello's motion for summary judgment.

h) The Eighth Circuit has an unwritten policy that allows oral argument to Ms. Mello, as an attorney party pro se, yet denies it to Viehweg, because he is a non-attorney party pro se.

i) The Eighth Circuit denies Viehweg's motion to prohibit Ms. Mello from violation federal statue 28 §1654.

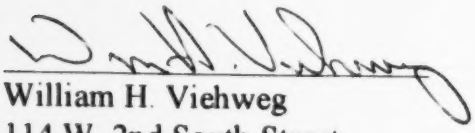
j) The Eighth Circuit affirms the trial courts granting of Mello's motion for summary judgment.

The discovery period was only six months long. Viehweg's motions to disqualify Ms. Mello from simultaneous representation, relief from her harassment, and to extend the discovery period, were not heard until after the close of discover, and then were summarily denied. Ms. Mello did not request prior permission to represent herself pro se while she was simultaneously represented by legal counsel. Instead, she entered her notice of appearance as co-counsel to falsely represent to Viehweg, and to the court, that Ms. Mello had the absolute right to co-representation, and was appearing as licensed counsel. Ms. Mello's actions were designed to discourage Viehweg from fully partaking of the discovery process. Ms. Mello's intents to thwart discovery by Viehweg and to harass Viehweg were so improper that Ms. Mello's attorneys of Moser and Marselek withdrew from representing her immediately after the November 17, 1997 discovery conference. Another law firm subsequently withdrew from representing her for the same reason.

CONCLUSION

The application of federal statute 28 §1654 in this case, by both the Eighth Circuit and the trial court, was unjust per se by restricting only one party class and not the other. It put restrictions on Viehweg's non-attorney party class, but did not restrict Mello's attorney party class. This Court should review this case not just for Viehweg, but also for themselves. Ms. Mello's actions will, if unchecked, set a precedent that will tarnish the reputation of the federal judiciary.

Respectfully submitted,



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